UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

WILLIAM H. DAVIS, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JASON H. DAVIS, APPELLANT v. DEVAL L. PATRICK, MARTHA COAKLEY, IN THEIR PERSONAL CAPACITIES FOR ACTIONS AND OMISSIONS ENGAGED IN BY THEM, UNDER COLOR OF STATE LAW, WHILE ACTING AS THE DULY ELECTED GOVERNOR AND ATTORNEY GENERAL, RESPECTIVELY, OF THE COMMONWEALTH OF MASSSACHUSETTS, APPELLEES	DOCKET NO. 14 - 2306 **APPELLANT'S MOTION TO OBTAIN A REHEARING EN BANC**

Comes now the Appellant, William H. Davis, in his capacity as Personal Representative of the Estate of Jason H. Davis ("Davis Estate"), and moves this Honorable Court to grant a Rehearing En Banc, pursuant to Fed. R. App. P. 35, predicated upon the following grounds:

I. THIS PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL PUBLIC IMPORTANCE WHICH ARE RARELY CONSIDERED BY EITHER THIS COURT OR THE SUPREME COURT

Personal liability claims under 42 U.S.C. 1983, asserted against high ranking State Executive Branch Officials such as Governors and Attorneys General, are only rarely considered by this Court and the Supreme Court. It is of exceptional public importance that issues germane to such litigations be decided correctly, in the first instance, due to the infrequency with which they arise in our judicial system. The normal ebb and flow of the judicial process, which would otherwise quickly eradicate incorrect holdings by Panels through successive litigations, is not present in this aberrational context. The Panel's Opinion directly perpetuates the ability of Massachusetts'

Governors and Attorneys General to engage in the very autocratic behavior which has long violated hallmark principles of the Due Process and Equal Protection Clauses. See Jones v. SEC, 298 U.S. 1, 23-24 (1936). The Appellant's prior filings and this Motion alone prove as much. This proceeding involves questions of exceptional public importance.

II. THE PANEL OPINION DIRECTLY CONFLICTS WITH AND VIOLATES NUMEROUS DECISIONS AUTHORED BY THIS COURT AND THE SUPREME COURT AND CONSIDERATION BY THIS COURT IS NECESSARY TO SECURE AND MAINTAIN THE UNIFORMITY OF BOTH ITS AND THE SUPREME COURT'S DECISIONS

A. Fed. R. Civ. P. 12(b)(6) and Due Process Clause right to be "heard"

The authorities which the Panel Opinion conflicts with and violates, in the 12(b)(6) and Due Process Clause contexts, include Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 53 (1st Cir. 2013), Grajales v. P.R. Ports Authority, 682 F.3d 40, 44 (1st Cir. 2012), Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009), Medina – Valazquez v. Hernandez - Gregorat, ___ F. 3d ___, Slip Op. p. 2 (1st Cir. 2014) [Docket No. 12-2492] and Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

B. Judicial Estoppel

The authorities which the Panel Opinion conflicts with and violates, in the judicial estoppel context, include New Hampshire v. Maine, 532 U.S. 742, 749 - 750 (2001).

C. Fair Notice Provision

The authorities which the Panel Opinion conflicts with and violates, in the fair notice provision of the Due Process Clause context, include FCC v. Fox Television Stations, 567 U.S. ___, 132 S. Ct. 2307, 2317 (2012).

D. Jury Trial Rights

The authorities which the Panel Opinion conflicts with and violates, relative to Seventh

Amendment jury trial rights, include U.S. Const. amend. VII, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996), Monterey v. Del Monte Dunes at Monterey, LTD., 506 U.S. 687, 709, 723-730 (1999); Walker v. New Mexico & Southern Pacific Railroad Co., 165 U.S. 593, 596 (1897) and Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 498 (1931).

III. SUMMARY OF COMPLAINT

The Complaint asserts that the Messier Settlement violated the Davis Estate's Equal Protection and Due Process Clause rights. This obtains since the former Governor of Massachusetts (Deval L. Patrick) and its former Attorney General (Martha Coakley), each of whom perpetuated and were responsible for the Messier Settlement, indemnified the Messier Estate for grossly negligent, willful and malicious civil rights violations even though they were expressly prohibited from doing so under M.G.L. c. 258, § 9 ("Indemnification Statute"). Since indemnification of the Messier Estate claims was foreclosed, under the Indemnification Statute, the proffered indemnification could only have been remitted under an Executive Branch Custom or Executive Fiat as alleged in the Complaint. (AP/5-81).[1] The failure of the Appellees to treat the Davis Estate on an equal footing with the Messier Estate, relative to the administration of the Executive Branch Custom and Executive Fiat, violated its Equal Protection and Due Process Clause rights. (AP/5-81). The Complaint was dismissed by the District Court under Fed. R. Civ. P. 12(b)(6) which was affirmed by the Panel on September 18, 2015.

IV. THE PANEL OPINION CONFLICTS WITH NUMEROUS DECISIONS AUTHORED BY THE SUPREME COURT AND THIS COURT UNDER Fed. R. Civ. P. 12(b)(6), IT VIOLATES HALLMARK PRINCIPLES OF THE DUE PROCESS CLAUSE AND IT RELIES UPON UNCONSTITUTIONAL LEGAL PROPOSITIONS WHICH HAVE NEVER BEEN ENDORSED BY ANY COURT IN THE UNITED STATES

[1] References to the record appendix shall be to the page of same, e.g., (AP/5-81).

The implicated panel ("Panel") holding is as follows:

> The Commonwealth did not indemnify the Davis estate's punitive damages award because § 9 bars indemnification for employees who have 'acted in a grossly negligent, willful or malicious manner,' Mass. Gen. Laws ch. 258, § 9, and the punitive damages were premised on the jury's finding that Westborough staff members acted in just this way because they harbored ill will toward Jason.[2] **No such finding or admission was made in the Messier case, which was settled before trial. Even assuming that the Messier estate asserted 'intent based civil rights claims,'[3] as alleged in the complaint, we have no basis in this record to conclude that any such torts were committed in a grossly negligent, willful, or malicious manner. In the absence of such a finding, appellant provides no legitimate argument why § 9 would prohibit the Commonwealth from settling those claims for $2 million.** Hence, because the statute prohibits payment of the Davis punitive damages award, but does not prohibit payment of the Messier settlement, appellant has failed to sufficiently allege that the two estates are similarly situated. To the extent appellant argues that the Messier and Davis cases are similar because the Messier defendants were alleged to have "acted in a grossly negligent, willful or malicious manner," Mass. Gen. Laws ch. 258, § 9, the Davis estate's argument has no merit. **Unlike the Davis case, where a jury had determined that state employees deprived Jason of his civil rights and awarded him punitive damages, in the Messier settlement agreement (which appellant incorporated into the complaint), the state employee defendants 'expressly den[ied] any violation of rights, and . . .any liability or wrongdoing in connection with the allegations and/or legal claims made by' the Messier estate.** (emphasis supplied). Davis v. Patrick, ___ F. 3d ___, Slip Op. at p. 11-12 (1st Cir. 2015) [Docket No. 14 - 2306].

Fed. R. Civ. P. 12(b)(6) - conflicts with the decisions of this Court and the Supreme Court

In this Fed. R. Civ. P. 12(b)(6) appeal the Davis Estate must only demonstrate that its Complaint asserted plausible, well-pled and non-conclusory factual allegations in support of its civil claims. See Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 53 (1st Cir. 2013); Grajales v. P.R. Ports Authority, 682 F.3d 40, 44 (1st Cir. 2012); Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). A "court may not disregard

[2] Jason Davis' judgment was not indemnified, under M.G.L. c. 258, § 9, because the punitive damages imposed by the jury were found by it to have been "malicious" in nature as per the jury instructions. (AP/186). Punitive damages are not subject to indemnification under M.G.L. c. 258, § 9, in the non-constitutional officer civil rights violations context, because they result from "willful" and "malicious" conduct. See Pinshaw v. Metropolitan District Commission, 402 Mass. 687, 697 (1988) (quoting with approval Smith v. Wade, 461 U.S. 30, 39-40 & n.8, 56 (1983)). See infra. This is consistent with the face of the statute. See M.G.L. c. 258, § 9.

[3] It is beyond cavil that the first three Counts of the Messier Complaint assert intent based civil rights claims. (AP/230-232). See infra.

properly pled factual allegations, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'" Ocasio-Hernandez, 640 F. 3d 1, 12 (1st Cir. 2011) (quoting Twombly, 550 U.S., at 556). Indeed, "a well pleaded complaint may proceed even if....a recovery is very remote and unlikely." Id. "At the pleading stage, we accept the truth of all well-pleaded facts and draw all inferences therefrom in the pleader's favor." Grajales v. P.R. Ports Authority, 682 F. 3d 40, 44 (1st Cir. 2012). "In reviewing the grant of a motion to dismiss, we recite the facts as alleged in the Complaint and documents incorporated by reference into the Complaint." Medina – Valazquez v. Hernandez - Gregorat, ___ F. 3d ___, Slip Op. p. 2 (1st Cir. 2014) [Docket No. 12-2492]. The "prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint." Rodríguez-Reyes, 711 F.3d. at 54. The Davis Estate, however, actually ***did set forth*** an excruciatingly detailed ***evidentiary proffer*** in its Complaint which not only complied with the "plausibility" standard under 12(b)(6) but which actually warrants entry of summary judgment on all Claims. When the Panel ignored this detailed evidentiary proffer it violated core principles of both 12(b)(6) and the Due Process Clause.

The Complaint is 77 pages long and has a 43 page fact pattern. Its 26 expressly incorporated exhibits total another 249 pages. (AP/5-326). However, **only eight (8) sentences** in the Panel Opinion are devoted to the "facts" of the "Messier litigation". A thimble's worth at most. The "homicide" finding by the Massachusetts Medical Examiner, Death Certificate, Report of Autopsy, Messier Video and the six (6) indictments ("Six Indictments"), together with the critical scientific and fact laced information which this evidence contains, were ignored by the Panel in derogation of 12(b)(6).[4] A proverbial avalanche of salient facts, which uncontrovertibly establish beyond any doubt that the Messier Individual Defendants acted in a grossly negligent, willful and

[4] These documents and video were authored by the Commonwealth of Massachusetts and will be independently admissible in a trial of this matter under Fed. R. Evid. 803(6), (8).

malicious manner when they committed the civil rights violations which killed Joshua K. Messier, were not recited by the Panel in its opinion. ***Why is that?*** The ignored facts are reiterated here.

On May 4, 2009 Joshua K. Messier was an acutely psychiatrically ill, involuntarily committed inpatient housed at the Bridgewater State Hospital for the purposes of psychiatric observation. (AP/23, 29, 210, 212-222). On said date he was murdered during the course of a four point mechanical restraint which went horribly awry. (AP/23-34, 210, 212-222). He was 23 years old. (AP/23, 210). **Joshua K. Messier's Death Certificate and Report of Autopsy, which were authored and executed by a Massachusetts State Medical Examiner (Mindy J. Hull, M.D.), list "homicide" as his "manner of death" and his "cause of death" as "cardiopulmonary arrest during physical restraint, with blunt impact of head and compression of chest, while in agitated state."** (AP/24, 210, 213). Joshua K. Messier's Report of Autopsy depicts numerous blunt force trauma injuries to his head, brain, neck, torso and extremities. Indeed, Joshua K. Messier's entire body had been subjected to blunt force trauma during the alleged four point mechanical restraint.[5] (AP/24, 214-215). Joshua K. Messier also suffered brain bleeding as a result of the attempt to implement the four point mechanical restraint upon him on May 4, 2009. (AP/24, 214-215). The videotaped death of Joshua K. Messier, which is publicly available via the internet ("Messier Video") and independently admissible in Fed. R. Civ. P. 12(b)(6) proceedings, also proves that he was murdered as a result of grossly negligent, willful and malicious excessive force having been employed upon him.[6] (AP/24). The Messier Video, Death Certificate and Report of Autopsy demonstrate, as well, that on May 4, 2009 Joshua K. Messier was subjected to the psychiatrically proscribed "suitcasing" or "hog-tying" technique which caused him to

[5] Blunt force trauma of this type never occurs "accidentally". People necessarily intend to do what they have done when injuries of this sort are sustained.

[6] See footnote 2 in the Davis Estate's Opening Brief ("OB") at page 11.

suffocate, sustain cardiopulmonary arrest and die. (AP/24, 212-222, 210). In the aftermath of the purported four point mechanical restraint it was evident, as per the Messier Video, that Joshua K. Messier was both lifeless and seriously injured but yet no "red alert", cardiac pulmonary resuscitation or other emergency medical treatment was rendered for approximately ten (10) minutes. (AP/25). It gets even better.[7]

The current Massachusetts Attorney General, Maura Healey, represents both Appellees in this proceeding. Only recently ***she*** indicted ***three*** of the Messier Individual Defendants ("Three Messier Individual Defendants") for their criminal civil rights violations at issue here.[8] The Three Messier Individual Defendants were indicted for having engaged in intentional criminal civil rights violations which proximately caused Joshua K. Messier to be killed on May 4, 2009. See MSR1/1-9; M.G.L. c. 265, §13; M.G.L. c. 265, §37.[9] Two (2) true Bills of Indictment were returned against each of the Three Messier Individual Defendants by a Statewide Grand Jury and they read as follows:

[Each Defendant] on or about May 4, 2009 at Bridgewater in the County of Plymouth did,

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[7]The finding of "homicide", the blunt force trauma injuries, the brain bleeding, the hog-tying technique, leaving a lifeless body on a table for 10 minutes and the Indictments alone evidence grossly negligent, willful and malicious conduct on the part of the Messier Individual Defendants. However, this level of culpability actually draws further and impenetrable evidentiary support from the particularized constitutional rights to which the involuntarily committed are actually entitled. See Youngberg v. Romeo, 457 U.S. 307 (1982) and Davis v. Rennie, 264 F. 3d 86 – 116 (1st Cir. 2001). When viewed in this context, gross negligence, willfulness and malice are easily discerned on this record. (AP/29-30). The Davis Complaint applies these constitutional standards to the conduct which transpired. This leads to more than a "plausible" conclusion that the Messier Individual Defendants acted in a grossly negligent, willful and malicious fashion when they violated Joshua K. Messier's civil rights thereby killing him. (AP/29-30).

[8]See Exhibit 1 appended to Appellant's Motion to Supplement Record which motion was filed on May 13, 2015. Said indictments were filed with it. The Panel did not rule upon this motion and the indictments were not referenced in the Panel Opinion. The indictments obviously have great evidentiary value here on an assortment of different issues including the plausibility of the allegations in the Complaint and judicial estoppel. References to the exhibit filed with the Motion to Supplement Record shall be to the Exhibit number and page, e.g., (MSR1/1-9).

[9]See M.G.L. c. 265, §13; (MSR1/1-9); Commonwealth v. Welansky, 316 Mass. 383, 400 (1944); Commonwealth v. Sheppard, 404 Mass. 774 , 776 (1989); Commonwealth v. Catalina, 407 Mass. 779 , 783 - 784, 787- 789 (1990); Ariel A. v. Commonwealth, 420 Mass. 281, 287 & n. 7 (1995); Commonwealth v. Auditore, 407 Mass. 793, 796 (1990); M.G.L. c. 265, §37; Davis v. Rennie, 264 F. 3d 86-116 (1st Cir. 2001); Younberg v. Romeo, 457 U.S. 307, 316, 321-322, 324 (1982); Graham v. Connor, 490 U.S. 386, 394 – 399 (1989).

> by means of intentional battery (excessive use of force) with such violence that harm was likely to result, or by means of wanton or reckless conduct in disregard of the probable consequences of his actions, assault and beat Joshua K. Messier and by such assault and beating did kill Joshua K. Messier, in violation of General Laws Chapter 265, Section 13. (MSR1/1, 4, 7) (brackets supplied; parenthesis in original).
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> [Each Defendant] on or about May 4, 2009 at Bridgewater in the County of Plymouth, acting under color of law, by force or threat of force did willfully injure, interfere with, oppress or threaten Joshua K. Messier in the free exercise of rights and privileges secured to him by the constitution and the laws of the Commonwealth and the United States in violation of General Laws Chapter 265, Section 37. (MSR1/2, 5, 8) (brackets supplied).[10]

The probable cause determinations made by the Statewide Grand Jury, i.e. that the Three Messier Individual Defendants willfully, wantonly, recklessly and intentionally engaged in criminal civil rights violations which killed Joshua K. Messier on May 4, 2009, concurrently demonstrate that the Appellant's allegations in its civil Complaint "plausibly" assert that the Three Messier Individual Defendants engaged in civil rights violations in a grossly negligent, willful and malicious manner. (MSR1/1-9; AP/5-81); Commonwealth v. Javon, 403 Mass. 808, 816 - 817 (2012).

The Complaint, in addition to the recited evidence, sets forth 14 additional civil rights violations which were committed, at the very least, in a grossly negligent, willful and malicious manner. (AP/29-30). The Complaint also sets forth excruciatingly detailed evidentiary proffers, complete with exacting legal analyses, which prove that the Messier Individual Defendants: (i) willfully and maliciously murdered Joshua K. Messier with extreme atrocity and cruelty under M.G.L. c. 265, § (Murder 1); and (ii) willfully murdered Joshua K. Messier in violation of 18 U.S.C. §242 and 42 U.S.C. §1983. (AP/25-31). **It is against this factual backdrop that the**

[10]The "standard for sustaining an indictment against a sufficiency of the evidence challenge..." in Massachusetts is whether " 'the grand jury...hear[d] sufficient evidence to establish the identity of the accused...and probable cause to arrest him' for the crime charged." Commonwealth v. Javon, 403 Mass. 808, 816 - 817 (2012) (brackets supplied, citations omitted). "'Probable cause requires sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed . . . ." Id., at 817. (citations omitted). "This calls for 'something definite and substantial...'" Id., at 817. (citations omitted).

Panel concluded that "we have no basis in this record to conclude that any such torts[11] were committed in a grossly negligent, willful, or malicious manner." The errors by the Panel are fundamental and emanate from a wholesale failure by it to apply the most basic 12(b)(6) principles codified by this and the Supreme Court. This failure also violates Due Process.[12]

The Panel recited unconstitutional legal propositions which have never been endorsed by any Court in the United States

The Panel contended that because there had been no prior judicial finding,[13] which held that the Messier Individual Defendants acted in a grossly negligent, willful or malicious manner, this dictated that there was "no basis in this record to conclude that any such torts were committed in a grossly negligent, willful, or malicious manner."[14] It also contended that the liability denials by the Messier Individual Defendants in the Settlement Agreement somehow insulated them, in this proceeding, from the contention that they acted in a grossly negligent, willful or malicious manner. These contentions are without legal support in the United States, have no merit and violate the Constitution. The Davis Estate is entitled, in the first instance, to prove the level of culpability of the Messier Individual Defendants and it claimed a right to a jury trial to do so here. This right has

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[11] The Messier Complaint unabashedly asserts State and Federal civil rights claims and not just "torts" as the Panel contends. (AP/230-234). In fact, 27 civil rights claims are actually asserted. (AP/224, 230-234).

[12] One can hardly have been "heard…'in a meaningful manner'…", as required under the Due Process Clause, when a Panel fails to consider and apply an entire body of applicable law (12(b)(6)). Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

[13] It has been demonstrated above and below that there was, in fact, a prior "judicial finding" by a Statewide Massachusetts Grand Jury which returned the Six Indictments against the Three Messier Individual Defendants. (MSR1/1-9). However, the absence of a prior judicial determination would be irrelevant here. See *infra.*

[14] It was demonstrated above that there was actually a legal and factual basis, in the record, to conclude that the Messier Individual Defendants engaged in grossly negligent, willful and malicious conduct in the context of their civil rights violations. See *supra.* The "findings" in the Death Certificate and Report of Autopsy (homicide) are part of this record.

been violated by the Panel's holding. See infra.[15] The purported absence of a prior judicial determination simply has no effect on the nature of the conduct initially undertaken by a culprit as we know only too well from the thousands of unsolved murder cases here in the United States. (OB/26-32). Conduct which is grossly negligent, willful and malicious when it is committed does not somehow become negligently inflicted merely because there has been no judicial determination made relative to the level of culpability. No case ever decided in the history of the United States stands for this proposition.

The liability denials of the Messier Individual Defendants are likewise legally and factually irrelevant. The Davis Estate is not a signatory to the Messier Settlement Agreement, it is not bound by it and seeks nothing from any of the Messier Individual Defendants. Liability denials in settlement agreements do fix the level of culpability of the culprits in third party litigation or foreclose such third party litigation altogether. Indeed, the current Attorney General, Maura Healey, herself commenced a criminal prosecution against the Three Messier Individual Defendants notwithstanding the absence of any prior judicial determination, relative to their level of culpability, and in the presence of their express liability denials in the Messier Settlement Agreement. A murderer's denial of liability in a civil settlement agreement does not dictate that he did not murder his victim. These liability denials are relevant only to the parties which execute civil settlement agreements.

V. THE PANEL'S OPINION CONFLICTS WITH THE PRECEDENT OF THE SUPREME COURT, RELATIVE TO THE DOCTRINE OF EQUITABLE ESTOPPEL, BY PERMITING APPELLEES AND THEIR COUNSEL TO ARGUE

[15]By holding that the Davis Estate must have come into this litigation armed with a judicial determination, which found that the Messier Individual Defendants acted in a grossly negligent, willful and malicious manner, it deprived the Davis Estate of quintessential Due Process Clause and Seventh Amendment rights. See Section VII. *infra*. The Davis Estate, after all, commenced this litigation ***to prove this very proposition*** - with the aid of a jury - which it had the right to do. Imposing this requirement upon the Davis Estate, as a condition precedent to even commencing this litigation, affronts the most basic principles of the Due Process Clause and the Seventh Amendment. See infra. The Panel's holding in this regard stripped the Davis Estate of its Jury Trial rights under the Seventh Amendment and actually the basic right to even litigate this case - with or without a jury - as well.

DIVERGENT LEGAL THEORIES IN TWO COURTS AT THE SAME TIME

Depending entirely upon the court where it finds itself, the Office of the Attorney General has put forth diametrically opposed legal positions to suit its then present needs: negligence in this case[16] but willful, wanton, reckless and intentional conduct in the Plymouth Superior Court criminal cases commenced against the Three Messier Individual Defendants.[17] This conduct violates the judicial estoppel doctrine as articulated by the Supreme Court. See New Hampshire v. Maine, 532 U.S. 742, 750 (2001). "[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" Id., at 749 (citation omitted; brackets in original). See RB, p. 23-27; MSR 1/1-9.

VI. THE PANEL OPINION VIOLATES THE FAIR NOTICE PROVISION OF THE DUE PROCESS CLAUSE AS A CONSEQUENCE OF ITS CLEARLY ERRONEOUS CONSTRUCTION OF A STATE STATUTE

The Panel's Opinion contains a gross error of law, relative to its construction of M.G.L. c. 258, § 9, which infects and is the predicate for its entire opinion. This error violates as well the "fair notice" provision of the Due Process Clause. See FCC, 132 S. Ct., at 2317. A portion of this indemnification related holding ("Indemnification Holding") reads as follows:

Appellant's argument is premised on a fundamental misunderstanding of Massachusetts

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[16]It asserted that the conduct of the Messier Individual Defendants was merely "negligent" in this proceeding thereby attempting to place said Defendants within the ambit of the Indemnification Statute. (OB/1-55).

[17]Judicial notice can be taken of the fact that during 2014 the Appellee, former Massachusetts Attorney General Martha Coakley, appointed Special Assistant Attorney General Martin F. Murphy to act as the Special Prosecutor relative to the death of Joshua K. Messier. When she made this appointment she was the sitting Massachusetts Attorney General who acted for and in behalf the Massachusetts Executive Branch and then Governor Patrick's administration. The Appellant was obviously without the ability to engage in any discovery in the District Court since no Scheduling Order was entered. See Fed. R. Civ. P. 26; (AP/1-4).

> law. He contends that, under § 9, 'only negligent conduct is subject to indemnification' and 'intentional torts and civil rights violations committed by public employees . . . are not subject to indemnification.' Appellant's Reply Br. at 6, 9. Appellant is incorrect. In fact, the statute explicitly authorizes public employers to indemnify public employees who have committed 'an intentional tort' or have committed 'any act or omission which constitutes a violation of the civil rights of any person under any federal or state law.' Mass. Gen. Laws ch. 258, § 9.

With all due respect to the Panel, it is the Panel – not the Davis Estate – which labors under a "fundamental misunderstanding of Massachusetts law". Its Indemnification Holding is fraught with acute legal error, it mischaracterizes the Davis Estate's positions and the cases cited by the Panel do not support its position. It is of moment to note that even the Appellees never attempted to place such a construction on the Indemnification Statute because its plain text precludes same.[18] We must start with the raw text of the pertinent portion of the statute since it is dispositive:

> **M.G.L. c. 258, §9. Public Employers May Indemnify Employees; Exception.**
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> **No such employee or official**, other than a person holding office under the constitution acting within the scope of his official duties or employment, **shall be indemnified under this section for violation of any such civil rights if he acted in a grossly negligent, willful or malicious manner. (emphasis supplied).**

The statute could be no clearer. It has two prongs at issue here. The first prong is for constitutional officers. If they engage in grossly negligent, willful or malicious conduct, which proximately causes a civil rights violation, this conduct may be indemnified. The second prong is for non-constitutional officers. If they engage in grossly negligent, willful or malicious conduct, which proximately causes a civil rights violation, this conduct will not be indemnified.[19]

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[18]Indeed, on June 11, 2008 former Governor Patrick advised the Davis Estate, in writing, that "I have reviewed the materials that you have provided and researched the applicable law. Section 9 of Chapter 258 of the General Laws governs the Commonwealth's ability to pay judgments arising out of intentional tort or civil rights actions filed against individual state employees. The statute prohibits the Commonwealth from indemnifying an employee for civil rights violations involving grossly negligent, willful or malicious conduct." (AP/21, 146-147).

[19]The differentiation in treatment, as between constitutional officers and non-constitutional officers, was referenced no less than four (4) times in the Davis Complaint where it was also alleged that none of the employees in Davis or

The extraction of holdings from M.G.L. c. 258, §9 cases must be done with contextual precision since the implicated courts are necessarily addressing one of the two prongs referenced above.[20] The prong at issue here – relating to non-constitutional officers – has always been subject to uniform and clear interpretations. The "Legislature apparently sought to limit the ability of public employers to expose the taxpayers to potentially sizable financial obligations arising out of **intentional torts and civil rights** violations committed by public employees." Filippone v. Mayor of Newtown, 16 Mass. App. Ct. 417, 427 (1983)(emphasis supplied).[21] The phrase "intent

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Messier were, in fact, constitutional officers. (AP/18, 31, 35, 49). This differentiation in treatment was also referenced no less than six (6) times in the Opening Brief. (OB/8, 12, 28, 29, 49, 50). The Reply Brief recited the referenced statutory language and then defined its scope within the context of this matter. (RB/6). To suggest, as the Panel has, that the Davis Estate contended, as a blanket proposition, that civil rights violations are ***never subject*** to indemnification under §9 is not accurate. It never did.

[20]The Panel, with all due respect, cited three cases which are either contextually inapplicable or which actually support the Appellant's position. One case (Triplett v. Town of Oxford, 439 Mass. 720 -728 (2003)) involved indemnification of Town employees under M.G.L. c. 258, §13. While it did refer to §9 none of its holdings are inconsistent with the analysis above or the plain text of the statute. No Town employees are implicated here. The second case (City of Boston v. Boston Police Patrolmen's Association, Inc., 48 Mass. App. Ct. 74, 75 (1999)) involved an attempt by an arbitrator to order the City of Boston, through a union agreement, to indemnify its municipal police officers in a manner consistent with M.G.L. c. 258, §9A which calls for the mandatory indemnification of only State Police Officers. The Union had actually only sought a provision, in the union agreement, which was consistent with M.G.L. c. 258, §9. A lengthy discussion was undertaken in that case about §9 but it only cements the construction of the statute which its plain text commands. The "union sought a contract provision committing the city, mandatorily, to indemnify patrolmen to the extent permitted by M.G.L. c. 258, s. 9: that is to say, up to one million dollars for liabilities arising out of intentional torts or civil rights violations so long as the violations were committed within the scope of their employment and were not the product of gross negligence or willful or malicious conduct." Id., at 75-76. The third case (Venuti v. Venuti, 702 F. 2d 6 (1st Cir. 1983)) is not only a non-binding federal case but it only offhandedly refers to §9 in dicta and, even then, such dicta is wholly consistent with the plain text of the statute as it relates to the first prong. "The State can more easily provide for appropriate shifting of financial burdens when it enacts indemnification statutes. Cf. Mass. Gen. Laws Ann., ch. 258, Sec. 9 (indemnification of public employees for civil rights litigation)." Id., at 8. (parentheses in original). Nonetheless, the Davis Estate is entitled to the enforcement of the statute according to its plain terms in accord with the Due Process Clause. See FCC, 132 S. Ct., at 2317.

[21]The holdings by the Courts actually extend to "intentional torts" in addition to civil rights violations. This result obtains because when intent based common law tort claims are asserted, pendent to viable intent based civil rights claims, they necessarily also seek redress for "civil rights violations". See Filippone v. Mayor of Newton, 16 Mass. App. Ct. 417, 432 & n. 3, n. 5 (1983) (overruled on other grounds). Such claims are not subject to indemnification under §9 simply because, regardless of moniker, they seek redress for "constitutional violations". Id. Such is the case when, for example, a Mental Health Care Worker physically brutalizes an involuntarily committed mental ill inpatient housed at a State Hospital. This conduct gives rise to both an excessive force claim under 42 U.S.C. §1983 and an assault and battery claim under State law. However, both claims seek redress for the "civil rights violations" spoken to in the statute. Certainly, civil rights violations may be redressed through a common law claim. They would be in this example since a State actor brutalized a State hospital patient under color of State law.

based civil rights claims" has engendered, with all due respect, acute confusion amongst both the Appellees and the Panel. It need not have since "intent" is actually embedded into two of the levels of culpability (willfulness and maliciousness) which preclude indemnification in the non-constitutional officer civil rights violations context.[22] This is precisely why the Filippone Court referenced "intentional torts" and "intentional civil rights violations" in its holdings. Id.

Since the civil rights violations undertaken by the non-constitutional officer Messier Individual Defendants were committed through their grossly negligent, willful and malicious conduct these violations were ***not subject*** to indemnification under M.G.L. c. 258, §9 and could only have been paid through an Executive Branch Custom or the Executive Branch Fiat referenced in the Complaint.[23] There was simply no other methodology to pay them. The inability to indemnify under M.G.L. c. 258, §9 eviscerates the entire Panel Opinion since this is its unfettered foundational predicate.[24]

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[22] Massachusetts Courts have long held that "willful conduct is 'intentional and by design in contrast to that which is thoughtless or accidental.'" Commonwealth v. McDowell, 62 Mass. App. Ct. 15, 22 (2004) (quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 443 (1983)). Willful misconduct has also been defined in Massachusetts law "...as the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage..." Video Educ. Career Institute v. American Tel. and Tel. Co., 1990 WL 137297, 7 (D.Mass. 1990). Thus, a willfully performed act is, by its very nature, intent based conduct. The same is true with respect to acts which are maliciously performed. "Malice requires a showing that the defendant's conduct was 'motivated by 'cruelty, hostility or revenge.'" McDowell, 62 Mass. App. Ct. at 22 (citations omitted). Conduct hardly could be "'motivated by 'cruelty, hostility or revenge...'" if it occurred accidentally. One simply cannot be cruel, hostile or revengeful without intending to be so. The Supreme Judicial Court has expressly held that "malicious conduct" and "willful conduct" are, under M.G.L. c. 258, per se forms of intent based conduct given that they are "'motivated by evil motive or intent...'" and thus not subject to indemnification. Pinshaw v. Metropilitan District Commission, 402 Mass. 687, 697 (1988) (quoting with approval Smith v. Wade, 461 U.S. 30, 39-40 & n.8, 56 (1983)). One simply cannot be accidentally evil. Willful and malicious conduct are therefore "intentional" and "intent based" conduct. Thus, intent based conduct, like willful and malicious conduct, is not subject to indemnification under M.G.L. c. 258, §9.

[23] In footnote 4 of its opinion the Panel indicated that "Appellant does not cite any authority" explaining what "custom" or "fiat" means and that the Panel "found no legal authority explaining" these terms. Davis, Slip Op. at p. 9 & n. 4. "Custom" is found on the face of 42 U.S.C. §1983. "Executive Fiat", in the present context, is a proclamation by an Executive Branch official which violates the Constitution if not administered even handedly. Executive Branch fiats have been the subject matter of Supreme Court constitutional precedent for no less than eight decades. See Sterling v. Constantin, 287 U.S. 378, 397-398 (1932); Scheuer v. Rhodes, 416 U.S. 232, 248-249 (1974); Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 233-234 (1897).

[24] It should be noted that a very simple issue, not addressed by the Panel, is dispositive of this entire case. The former

VII. THE PANEL OPINION AND THE DISTRICT COURT VIOLATED THE DAVIS ESTATE'S RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT

The Panel proclaimed that there was no "basis in this record to conclude that any such torts were committed in a grossly negligent, willful, or malicious manner".[25] The District Court summarily proclaimed, during the course of the dismissal hearing, that the Messier Individual Defendants acted only negligently. (AP/327-340; OB/20-32). Each of these proclamations impermissibly violated fundamental Seventh Amendment rights of the Davis Estate, invaded the province of the jury and constituted reversible error since these proclamations were fact laden determinations which only juries can make. (AP/81; AP/327-340; OB/20-32). See above Supreme Court authorities. The District Court, contrary to the Panel's claim, **never** made any 12(b)(6) determination. (AP/327-340; OB/20-32). Instead, it just summarily proclaimed that the Messier Individual Defendants acted negligently. (AP/327-340; OB/20-32).

VIII. CONCLUSION

Wherefore, the Appellant requests that: (i) this Motion be allowed; (ii) the Judgment of the Panel be reversed; and (iii) that all relief sought in the Appellant's Opening Brief be granted.

Governor and Attorney General ***actually indemnified*** civil rights violations, committed through grossly negligent, willful and malicious conduct, as per the Settlement Documents. (AP/224-241; 314). The Messier Complaint lists nine (9) individuals as Defendants. The first five words of the Messier Complaint read as follows: "[t]his is a civil rights action..." (AP/31, 224). This Complaint asserts 27 intent based civil rights claims and 27 intent based common law claims (AP/224, 230-234). The Messier Settlement of $2,000,000 was paid relative to "all claims arising out of the facts raised in complaint...or which could have been raised or asserted in the [Messier Case] Litigation or in any other forum." (AP/314); (brackets supplied). The claims, relative to which the Messier Settlement was paid, include the referenced 27 civil rights claims and 27 intent based common law claims together with any other civil rights claim which: (i) "could have" been asserted in another forum; or (ii) "arose out of the facts raised" – not even proved - in the Messier Complaint. (AP/314, 313-323, 34-36, 210, 212-222, 23-36, 56-70). It is beyond question that the indemnification here constituted an express indemnification of civil rights violations which were committed in a grossly negligent, willful and malicious manner.

[25] We now know that this contention is untrue.

THE APPELLANT,
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CERTIFICATE OF SERVICE

I, Christopher M. Perry, counsel for the Appellant, herby certify that: (i) I electronically filed the foregoing Appellant's Motion for a Rehearing En Banc with the United States Court of Appeals for the First Circuit by using the CM/ECF system; and (ii) the following parties or their counsel of record, registered as ECF Filers, have been served via the CM/ECF system:

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Signed under the pains and penalties of perjury this 28th day of September, 2015.

/s/ Christopher M. Perry
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